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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

BERNHARD F. MANKO,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Petitioner Bernhard F. Manko prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit and respectfully submits this reply to the brief of the United States in opposition.[1]

### I

### THIS CASE SHOULD BE ARGUED TOGETHER WITH *UNITED STATES V. RATZLAF*

This Court, with the consent of the Solicitor General, recently granted a writ of certiorari in *United States v. Ratzlaf*, 113 S.

[1] Petitioner adopts the reply brief of his co-defendant Jon Edelman, submitted by his attorneys Williams & Connolly.

Ct. 1942 (1993), to determine whether the rule of *Cheek v. United States*, 498 U.S. 192 (1991) (a subjective reasonableness test must be applied to the good faith defense in criminal tax cases) applies to the good faith defense in a criminal case charging the defendant with structuring currency transactions to evade reporting requirements.

This case should be argued together with *Ratzlaf* or the petition here should be stayed[2] pending determination of *Ratzlaf* for two reasons:

1. a decision in *Ratzlaf* embracing *Cheek* will be futile if the rule can be skirted by a vague willfulness instruction coupled with a prosecutor's suggestion that the jury use an "objective reasonableness test"; and

2. in considering the application of the *Cheek* rule in *Ratzlaf*, the Court is likely to make a pronouncement which will be outcome determinative in *Manko*.

(1) The trial court below denied petitioner's requested *Cheek* charge regarding the defense of good faith and refused to inform the jury that the defendants' subjective belief was controlling. (Appendix E-3, E-13-15).[3] The charge given instead by the trial court merely included the following general language:

> A person who believes that his tax return truthfully reports the taxable income and allowable deductions under the tax law acts in good faith and cannot be found guilty of willfully filing a false return.

(Appendix E-13). This instruction omitted the pivotal concept announced in *Cheek* that a good faith defense is not negated by

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[2] This Court has deferred the consideration of a petition for a writ of certiorari where appropriate. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967).

[3] "92-1448 Petition at ____" refers to the Petition for a Writ of Certiorari of Bernhard F. Manko; "Appendix" refers to the Appendix to the 92-1448 Petition; "Gov. Opp. at ____" refers to the Brief for the United States in Opposition; "J.A. ____" refers to the Second Circuit Joint Appendix; and "T. ____" refers to the trial transcript.

a finding that the defendant's belief may have been objectively unreasonable. (Appendix E-13). A ruling by the Court in *Ratzlaf* which embraces or extends *Cheek* will be hollow if a prosecutor can circumvent the rule by submitting to the trial judge the incomplete instruction used in *Manko* (endorsed by the Second Circuit) and then arguing to the jury that a defendant's belief is objectively unreasonable and thus should be rejected.

In this case, the prosecution capitalized on the trial court's omission of the full *Cheek* instruction – that a defendant's good faith belief need not be objectively reasonable. The prosecutor did this during summation when he asked the jury: "Would any businessman or businesswoman act the way these guys did?" (Appendix E-5) and stated "It only happens in the Manko world, in the land of Edelman. That is the only place it happens." (Appendix E-4). The government also asked the jury to measure the defendants' conduct by what it argued "real businessmen" would believe or do under the circumstances (Appendix E-9) and the government invited the jury to substitute its own beliefs about the transactions at issue for those of the defendants. (Appendix E-10) ("You should acquit the defendants if you think you can do that"). A realistic assessment of the deliberative process of a jury should be part of the equation when the Court addresses important issues concerning jury instruction.[4]

(2) In *Ratzlaf*, this Court will necessarily address the parameters of the *Cheek* decision and whether it will be extended beyond the context of criminal cases involving violations of federal tax law requiring "willful" conduct under a specific statutory scheme. *See, e.g.*, 26 U.S.C. §§ 7201, 7203, 7206. The

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[4] The government argues that the prosecutor was merely inviting the jury to consider the reasonableness of petitioners' claims in deciding whether petitioners actually believed their conduct was legal. This contention is completely unsupported by the record and the government is unable to cite any argument or instruction to the jury to this effect. It would be unrealistic to conclude that the jury, without guidance, could discern the fine distinction between (a) considering the objective reasonableness of a belief as circumstantial evidence of subjective good faith; and (b) rejecting the defense outright because the belief was objectively unreasonable.

determination of *Ratzlaf* will inevitably reopen the *Cheek* rule and may require the Court to determine whether a subjective reasonableness standard is required under the broader mandate of Fifth Amendment due process. *See Cheek*, 498 U.S. at 206-07 n.11 (reserving question whether the standard of objective reasonableness violates Fifth Amendment since it was invalidated on statutory grounds). Under a constitutional standard, the prosecutorial argument in this case was reversible error.

## II

## THE COURT OF APPEALS APPLIED THE WRONG STANDARD TO THE CONCEDED ERROR OF THE *EX PARTE* CONFERENCE AND IMPROPERLY FOUND THE ERROR HARMLESS

### A. The Wrong Standard Was Applied

The government argues that the harmless error analysis applied by the Second Circuit and the resultant finding that there was "no reason to believe that the district court would have ruled differently absent the *ex parte* conference" was appropriate and the petitioner's argument that the district court "could have" ruled more favorably to the defense in one of several ways is irrelevant. (Gov. Opp. at 17). The government could not be more wrong.

This application of the harmless error doctrine is improper because this Court "has uniformly found constitutional error without any showing of prejudice when counsel was totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases). There can be no doubt that the tactical advantage gained by the prosecutor's *ex parte* conference occurred at a critical stage of the trial because, as the Second Circuit found, it gave the prosecutor a "tactical advantage" and a "leg up" in his rebuttal summation. (Appendix A-19-20). *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (summation is a "critical stage" of a criminal proceeding).

This Court recently set forth the appropriate mode of analysis to determine whether the harmless error doctrine may be

applied. *See Sullivan v. Louisiana*, 1993 WL 179275 at *4 (U.S. June 1, 1993). In *Sullivan*, this Court distinguished between, on the one hand "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." 1993 WL 179275 at *4 (*quoting Arizona v. Fulminante*, 111 S. Ct. 1246, 1265 (1991)). Denial of the right to be represented by counsel at a critical stage of a criminal proceeding is certainly an error of the former sort, the right to counsel being a "'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 1993 WL 179275 at *4 (*quoting Rose v. Clark*, 478 U.S. 570, 577 (1986)). *See Cronic*, 466 U.S. at 659 n.25.

The whole point of the adversary system is that, with the benefit of partisan advocacy, the district court could have ruled differently in any one of several ways favorable to the defendants. (92-1448 Petition at 13). The standard of review applied by the Second Circuit to the admittedly "highly improper" and "wholly unnecessary" *ex parte* conference (Appendix A-18-20) was improper because:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee.

*Sullivan*, 1993 WL 179275 at *3.

Here, it cannot be said that the guilty verdict rendered was "surely unattributable to the error" because the district court could have ruled differently absent the *ex parte* conference. The "leg up" and "tactical advantage" gained by the prosecution in

its rebuttal summation cannot be dismissed by simply terming the advantage "administrative". *See* Gov. Opp. at 17.

The government attempts to minimize the conflict between the Second Circuit's affirmation in this case and the Sixth Circuit's reversal in *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992). The government misapprehends Judge Timbers' (sitting by designation) careful two-part ruling in *Minsky*. The *Minsky* court did not apply harmless error analysis to the *ex parte* conference there but, *quoting Cronic*, reversed on the ground that the conference occurred at a critical stage of the proceedings. *Id.* at 874, 876. Only after stating that it would reverse the conviction did the court, in a separate and subsequent section of its opinion, decide that the *ex parte* ruling was incorrect.

**B. The *Ex Parte* Conference Prejudiced The Defendants**

The government notes that "the court of appeals did not explicitly address the question of which party bore the burden of proof on the harmless error issue". (Gov. Opp. at 12). The government then seeks to excuse this critical failure by arguing that "the government satisfied whatever burden it had" (Gov. Opp. at 12), by establishing that the *ex parte* ruling was not substantively erroneous and was merely administrative.

First, there is no doubt that the government bears the burden of proving that a federal constitutional error is harmless beyond a reasonable doubt. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1711 (1993).

To establish harmlessness, both the Second Circuit and the government rely heavily on the argument that the *ex parte* ruling was not erroneous. This reliance flies in the face of the Second Circuit's observation that "the propriety of using the chart cannot be the measure of whether the *ex parte* proceeding constituted reversible error. Otherwise, the fact of an *ex parte* proceeding would be irrelevant so long as the court ultimately made the right ruling." (Appendix A-20). Reliance on the propriety of the *ex parte* ruling cannot be allowed. *See Minsky*, 963 F.2d at 870 (separating determinations of whether *ex parte* conference was reversible and whether *ex parte* ruling was correct). Because the court could have ruled differently in any one of several ways

favorable to the defense, *see* 92-1448 Petition at 13, the government cannot satisfy its burden of establishing harmlessness beyond a reasonable doubt.

The government concedes that the charts previewed in the prosecution's secret *ex parte* conference with the trial judge were used at a critical stage of the proceeding, *i.e.*, during the prosecutor's rebuttal summation. (Gov. Opp. at 3-4). The government then argues that no prejudice resulted from the *ex parte* conference because "[t]he conference was purely administrative in nature and had nothing to do with the merits or substance of the case". (Gov. Opp. at 17). In so arguing, the government ignores petitioner's authorities attesting to the devastating impact of charts used in summation. *See*, *e.g.*, F. Lee Bailey & Henry B. Rothblatt, *Successful Techniques for Criminal Trials* § 24:11 at 544-45 (2d ed. 1985); 5 Melvin M. Belli, Sr., *Modern Trials* 69-120, 439-43 (2d ed. 1982); Jacob A. Stein, *Closing Argument* §§ 206-07 (1985); Albert H. Parnell, "The Effective Use of Demonstrative Aids in Closing Argument", *For the Defense* 15-20 (Dec. 1983). The government concurs with the Second Circuit that, despite the fact that the *ex parte* conference gave the prosecution a "tactical advantage" and a "leg up" in its rebuttal summation, the *ex parte* conference does not constitute reversible error because it concerned "merely" tactical or administrative issues. (Appendix A-19-20; Gov. Opp. at 17).

The pejorative labeling of the advantage gained as "administrative" does not alter the fact that the *ex parte* conference allowed the prosecution to ambush the defense. The "opportunity to challenge the use of the chart" (Gov. Opp. at 18) that the government claims cured the prejudice did not allow the defense to prepare its own forensic chart to undo the tactical advantage; it merely consisted of a forty-five minute break immediately before the prosecution began rebuttal summation. Defense counsel had one and a half minutes to review each of the 28 excerpts on the chart taken from over 6,000 pages of transcript: first to verify their accuracy and fair context and then to ascertain whether each was within the scope of proper rebuttal. The defense request for surrebuttal to display its own chart, creating an even playing field, was denied. (T. 6940-43, 7132).

## III

## THE DECISIONS BELOW ARE IN CONFLICT WITH THE LAW IN OTHER CIRCUITS CONCERNING THE REQUIREMENTS FOR AN INTEREST DEDUCTION

### A. The Split In The Circuits Is Conceded

The government does not contest that there is a split among the circuits as to the requirements for an interest deduction under Section 163(a) of the Internal Revenue Code. (Gov. Opp. at 25-26). Neither does the government contest that criminal liability is unduly and impermissably harsh "when the law [is] uncertain or cast in doubt by prior court decisions." *United States v. Heller*, 830 F.2d 150, 155 (11th Cir. 1987). *See* 92-1448 Petition at 21.

The Fourth, Sixth and Tenth Circuits follow the plain and clear rule of the statute and require only: (1) payment or accrual of interest; and (2) actual indebtedness. (92-1448 Petition at 21-22 and cases cited therein). The Second Circuit requires the additional element of a non-tax purpose (*i.e.*, a business purpose other than tax savings) or market risk (*i.e.*, an objective potential for economic gain apart from tax savings). (92-1448 Petition at 22-23 and cases cited therein).

### B. The Special Interrogatory Does Not Make The Split Academic

The government argues that this split among the circuits is not presented for resolution in this case because the Special Interrogatory purportedly shows that the jury found that the repo transactions were fictitious and never took place and did not base its' verdict on the Second Circuit (market risk/ business purpose) economic substance test.[5] (Gov. Opp. 25-26). This is wrong for three reasons.

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[5] In an effort to save the general verdict, the jury was given an unusual Special Interrogatory supposedly setting forth the prosecution's two alternative legal theories. (J.A. 481). The first question of the Special Interrogatory asked the jury to determine whether the prosecution had proven that: "the transactions

*(Footnote continued)*

The failure to instruct the jury as required by *Cheek*, *see* Point I, *supra*, would likely have affected the jury's consideration of the issue whether the defendants subjectively believed the transactions took place. Further, the *ex parte* summation charts, *see* Point II, *supra*, included quotations which targeted this issue and likely affected jury deliberations.[6]

Finally, the instruction relevant to the Special Interrogatory was fatally confusing as to which inquiry (fictitious transactions or economic substance) required business purpose. The court explicitly charged the jury that it could not find "genuine indebtedness" unless it also found the transactions had a "business purpose". (Appendix E-12). The alternative "economic substance" charge (Appendix E-12) erroneously defined the two prongs of economic substance as "a reasonable possibility of profit apart from tax deductions" and "market risk", thus omitting the "business purpose" prong. Thus, a rational jury, having just been instructed that business purpose was part of the test to determine if the trades were "genuine" (Appendix E-12), and that business purpose was not part of the economic substance test, could have reasonably (but erroneously) concluded that business purpose was determinative of whether the repo trades were "genuine", *i.e.*, "real" or "fictitious". This confusion was compounded by the court's later remark that transactions have economic

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charged in the Indictment . . . were fictitious and did not take place?" (J.A. 481). The jury answered this question "proven" and, as instructed, did not consider the second question of the Special Interrogatory, which asked whether or not the prosecution had proven that the transactions charged in the Indictment "actually took place but . . . lacked 'economic substance' in that they had no business purpose other than to create tax deductions and were subject to no market risk." (J.A. 481).

[6] Examples of the blown-up quotations which the defense could not address included:

| | |
|---|---|
| John Mann | TSMH transactions were called "paper trades": "A trade that's on paper, but doesn't have another substance." (T. 1581, 1583). |
| Catherine Sawyer | "Cosmetically, that's the way these trades were set up . . . ." (T. 1104, 1292) |

substance if they have business purpose or market risk (J.A. 1635) because a rational jury, trying to digest the confusing charge, could not possibly determine if business purpose applied to the first or second question of the Special Interrogatory, or both.

The Special Interrogatory did not remove the economic substance test from the consideration of the jury and thus this case presents a clear split among the circuits with the Second Circuit enforcing a stricter standard for the deductibility of interest in this criminal case than the Fourth, Sixth, and Tenth Circuits have applied in civil cases.

## CONCLUSION

For the foregoing reasons, petitioner Bernhard F. Manko respectfully requests this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and to reverse the conviction of petitioner Bernhard F. Manko.

Dated: June 8, 1993

Respectfully submitted,

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